In the Supreme Court of the United States

October Term, 1975

No. 75-6241

EVAN E. JONES, JR., individually and in his capacity as the Director of the Utah State Division of Family Services; PAUL S. ROSE, individually and in his capacity as the Executive Director of the Utah State Department of Social Services,

Petitioners,

-vs-

T..... H....., on behalf of herself, and all other persons similarly situated,

Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants, Evan E. Jones, Jr., Director of Utah State Division of Family Services, and Paul S. Rose,

Director of the Department of Social Services, bring this direct appeal from the June 26, 1975 Opinion, (Appendix A), and August 7, 1975, judgment by a statutory three judge Court of the United States District Court for the District of Utah, Central Division. (Appendix C). The judgment appealed from granted the respondent a declaration that regulations FPX 120, FPC 120, and 3.7(c) of the Utah State Plan for the Provision of Social and Medicaid Services are invalid. Pursuant to the Judgment, the majority Judges granted the respondent a permanent injunction enjoining and prohibiting the appellants, their agents, employees, and successors in office from enforcing regulations FPX 120, FPC 120, and 3.7(c) of the Utah State Plan for the Provision of Social and Medicaid Services requiring that family planning information counseling, services and supplies be given to a minor only upon receipt of the consent of parents of said minor. Appellants were further enjoined and prohibited from requiring any agency or organization with whom they have contracted for the provision to eligible persons for family planning information, counseling services and supplies from requiring that the agents and employees of said agencies or organizations require minors be given family planning information, counseling services, and supplies only upon receipt of the consent of the parents of said minors.

This appeal is taken pursuant to the provisions of Title 28, U.S.C.A., § 1253, and the appellants submit this Jurisdictional Statement to show that this is a direct appeal over which this Court has jurisdiction and that the appeal presents important and substantial federal questions which merit plenary review.

OPINION BELOW

The June 26, 1975, Opinion of the statutory three-judge United States District Court for the District of Utah, Central Division, is not reported yet. The text of the decision and the dissenting opinion are set forth in the Appendices as Appendix A and Appendix B.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

On Ougust 27, 1974, respondent filed a Complaint for declaratory and injunctive relief basing federal jurisdiction on Title 28, U.S.C.A., § 1331, 1343(3) and (4), and Title 42, § 1983. The respondent asked that the United States District Court for the District of Utah, Central Division, declare that insofar as the policies of the Division of Family Services of the Utah State Department of Social Services deny family planning information, counseling, services and supplies to minors who are sexually active and eligible for AFDC, Medicaid, or Social Service assistance, as provided by appellants, they are in conflict with and in violation of the provisions of § 602 (a)(15) and 1396 d (a)(4)(c) of Title 42, U.S.C., § 220.20 and 220.21 of Title 45, C.F.R., and the right to privacy as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America; respondent also asked for an injunction against the enforcement of these statutes. Declaratory relief was requested pursuant to Title 28, U.S.C.A., § 2201 and 2202, and a statutory three-judge court was requested in accordance with Title 28, U.S.C.A., §§ 2281 and 2284. A statutory three-judge court was ordered by the Honorable David T.

Lewis, Chief Judge of the United States Court of Appeals for the Tenth Circuit on the 8th day of November, 1974.

The judgment and Order of the statutory three-judge United States District Court for the District of Utah, Central Division, granting respondent's request for a declaratory judgment and injunction was entered on 7th day of August, 1975. On August 14th, 1975, an order staying execution of judgment pending appeal was entered, and on August 28, 1975, appellants filed with the United States District for the District of Utah, Central Division, a Notice of Appeal to this Court. (Appendix D).

The jurisdiction of this Court to review by direct appeal the District Court's Decision and Order granting a permanent injunction is conferred by Title 28, U.S.C.A. § 1253. Cases which sustain the jurisdiction of this court are *Schmidt v. Lessard*, 414 U.S. 473 (1974); *Evans v. Cornman*, 398 U.S. 419 (1970); *Wheeler v. Montgomery*, 397 U.S. 280 (1970); *Carter v. Jury Comm'n of Greene County*, 396 U.S. U.S. 320 (1970); *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Zwickler v. Kota* 389 U.S. 241 (1961).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The following provisions which are the subject of this action are set out fully in Appendix E.

1. FPX 120, FPC 120, and 3.7(c) of the Utah State Plan for the Provision of Social and Medicaid Services (Appendix E).

The following provisions are also the subject of this action but were omitted upon advice of the Deputy Clerk of the United States Supreme Court because of their easy access.

2. The United States Constitution, Fourteenth Amendment.
3. Title 42 United States Code, Section 602(a)(15), 1396 a (a)(8), and 1396 (d)(a)(4)(c).
4. Title 45 Code of Federal Regulations, Sections 220.20, 220.21, and 249.10(a)(6)(VI).

QUESTIONS PRESENTED

(1) Whether or not the Minor plaintiff in this case should have a guardian ad litem appointed to represent her.

(2) Whether or not the Regulations FPX 120, FPC 120 and 3.7(c) of the Utah State Plan for Providing Social and Medicaid Services to eligible individuals are valid and lawful exercises of state authority and are not prohibited by Sections 602(a)(15), 1396 a (a)(8), and 1396 (d)(a)(4)(c) of Title 42, United States Code, nor by Sections 220.20, 220.21, and 249.10(a)(6)(VI) of Title 45 C.F.R., nor by the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Respondent T——— H——— filed a complaint in the United States District Court for the District of Utah, Central Division, requesting declaratory and injunctive relief to require the Appellants to provide her and all others similarly situated with family planning in-

formation, family planning counseling, family planning services and supplies which Appellants refused to her if she did not secure the consent of her parents to the obtaining of said family planning information, counseling, services and supplies.

Respondent argued Utah State Plan for the Provision of Social and Medicaid Services FPX 120, FPC 120, and 3.7(c) violated her 14th amendment right to privacy, as well as Title 42 U.S.C. §§ 602(a)(15), 1396 a (a)(8), and 1396 (d)(a)(4)(c), and Title 45 C.F.R. §§ 220.20, 220.21, and 249.10(a)(6)(VI).

On May 9, 1975, a statutory three-judge court was convened, and the case was heard on oral argument and written briefs, without calling witnesses. On June 26, 1975, a two judge majority of the Court filed an Opinion granting the respondent's request for declaratory and injunctive relief. On July 22, 1975, Judge Aldon Anderson filed his Opinion dissenting from the holding of the Court.

On August 7, 1975, Judgment in accordance with the Opinion was entered for the plaintiff-respondent. Notice of Appeal to the United States Supreme Court was entered on August 28th, 1975, in the United States District Court for the District of Utah, Central Division. By this Jurisdictional Statement, the appellants Evan Jones, Utah State Director of the Division of Family Services, and Paul S. Rose, Utah State Director of Social Services, appeal the Opinion and Judgment.

ARGUMENT

THE INSTANT APPEAL PRESENTS A SUBSTANTIAL QUESTION OF LAW REQUIRING PLENARY CONSIDERATION BY THIS COURT.

1. THIS CASE PRESENTS A SIGNIFICANT SOCIAL ISSUE AFFECTING THE BASIC FABRIC OF OUR ENTIRE SOCIETY.

At the very heart of our nation is the family unit which forms the basic fabric of our society. When there is a breakdown in the family structure, including parental control, our entire society is weakened. Therefore, society has a vested interest in seeing the family unit strengthened and maintained. The majority opinion filed by the District Court in the instant case ignores entirely the question of the morals of children and the duty of parents to teach and instruct them so as to promote morality, health, and happiness.

The very purpose of the Social Security Act provisions is to preserve the family unit. The status of the parent imposes responsibility under the long accepted doctrine of *parens patriae*. The parent, because of such responsibility, should be allowed some control and rights to oversee the conduct of the minor child.

It is irrational to impose legal obligations on parents

of caring and providing for their children, and at the same time deny parents the right to exercise some control over their children's behavior.

Thus, to allow children access to contraceptives without parental knowledge and consent opens the way to promiscuity and encourages schisms in families.

II. THE COURT HAS NEVER DECIDED WHETHER THE RIGHT OF ACCESS TO CONTRACEPTIVES APPLIES TO MINORS.

In *Griswold v. Connecticut,* 381 U.S. 479 (1965), the Court left open the possibility that a state might validly regulate distribution, rather than use of contraceptives. No Supreme Court decision has held that minors have a fundamental right to contraceptives, and further, no Supreme Court decision has explicitly held that this claimed right is even applicable to minors. 88 Harv. L. Rev. at 1009. The doctrine of *Griswold, supra,* was expanded in *Eisenstadt v. Baird,* 405 U.S. 438 (1972), which extended the right to the use of contraceptives to unmarried adults, but did not go so far as to extend the right to minors. Thus, although the right of adults to contraceptives is clear, it is anything but clear whether minors are entitled to the same right. If so, it would be a major extension of the court-created right of privacy.

The instant case not only presents the Court with the opportunity to further delineate the right of privacy,

but also to test the established principle that fundamental constitutional rights accorded adults may be limited in their extension to minors, particularly when capacity is at issue.

III. THIS COURT HAS HELD THAT THE AGENCY INTERPRETATION OF THE SOCIAL SECURITY ACT IS ENTITLED TO GREAT WEIGHT.

Congress and this Court have firmly established that the Secretary of a federal executive agency has considerable discretion, and statutory interpretation by such agencies are entitled to great weight. "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman,* 380 U.S. 1 (1965), *Lewis v. Martin,* 397 U.S. 552, 559 (1970).

With all its administrative experience in sponsoring and enforcing such laws and regulations, the Department of Health, Education and Welfare, through its Regional Officer, approved Utah's plan with its parental consent requirement.

Thus, the fact that HEW saw no conflict with Utah's regulations and federal requirements must be given great weight and raises doubt as to the correctness of the majority opinion of the District Court in the instant case.

CONCLUSION

For the foregoing reasons it is respectfully requested

that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: Salt Lake City, Utah
October 23, 1975

Respectfully submitted,

Vernon B. Romney
Attorney General of Utah

Robert B. Hansen
Deputy Attorney General
Counsel of Record for Appellants

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

No. C 74-276

[Filed July 23, 1975]

OPINION

T..... H....., on behalf of herself, and all other persons similarly situated,

Plaintiff,

v.

EVAN E. JONES, JR., individually and in his capacity as the Director of the Utah State Division of Family Services; PAUL S. ROSE, individually and in his capacity as the Executive Director of the Utah State Department of Social Services; and THE PLANNED PARENTHOOD ASSOCIATION OF UTAH, a Utah non-profit corporation,

Defendants.

David S. Dolowitz, Salt Lake City, Utah, counsel for plaintiff.

Frank V. Nelson, Assistant Utah Attorney General, Salt Lake City, Utah, counsel for defendants.

David T. Lewis, Chief Judge, United States Court of Appeals.

Willis W. Ritter, Chief Judge, District of Utah.

Aldon J. Anderson, United States District Judge.

Lewis, Circuit Judge.

In this class action we consider the legality under federal law of state regulations that prohibit the Utah Planned Parenthood Association (UPPA) from providing minors with family planning assistance absent parental consent. Under 42 U.S.C. § 1983 the plaintiff seeks a declaratory order to the effect that these regulations violate her rights under federal statutes and the United States Constitution, and she seeks an injunction against their continued enforcement. A three-judge court was duly empaneled to hear her case. Our jurisdiction, which is not disputed, arises from 28 U.S.C. § 1343(3) and (4).

Pursuant to plans approved by the Department of Health, Education and Welfare (HEW), the state of Utah administers Aid to Families with Dependent Children (AFDC) and Medicaid, both of which programs are subsidized by federal funds and regulated under the Social Security Act of 1935, as amended, 42 U.S.C. § 601 *et seq.*; 42 U.S.C. § 1396 *et seq.* Federal law requires states participating in these programs to provide family planning assistance to those program recipients, including sexually active minors, who desire such assistance. 42 U.S.C. § 602 (a)(15); 42 U.S.C. §§ 1396(a)(8), 1396d(a)(4)(C). The state contracted with the UPPA for the latter to provide family planning services and supplies to AFDC and Medicaid recipients. Regulations FPX 120, FPC 120, and 3.7(c), which were adopted by the defendant state administrators and approved by HEW as part of the state's AFDC and Medicaid plans, provide that family

planning services to minors may be furnished only with written consent of the minor's parents.

At the time this action was filed, the plaintiff was fifteen years old. She is a member of a family receiving AFDC and Medicaid. She has sought family planning information, counseling, services, and supplies from the UPPA, but because she refuses to obtain permission of her parents the UPPA has, pursuant to regulations FPX 120, FPC 120, and 3.7(c), denied her assistance. She therefore challenges the state's regulations on the grounds that they violate her rights to family planning assistance under the Social Security Act and her right of privacy under the fourteenth amendment. In this action plaintiff T——— H——— represents herself and all other minors in the state who receive or who are eligible to receive either AFDC or Medicaid or both, and who seek family planning assistance from the UPPA.

In Doe v. Planned Parenthood Ass'n, 29 Utah 2d 356, 510 P.2d 75, the Utah Supreme Court held that the state's parental consent requirements do not violate the rights of minors under either the ninth amendment or the equal protection clause of the fourteenth amendment. In a summary order and without citation of authority, the United States Supreme Court dismissed Doe's appeal for want of jurisdiction. 414 U.S. 805. The defendants in the present action argue that the high court's summary dismissal in Doe v. Planned Parenthood Ass'n forecloses our examination of the issues raised by plaintiff T——— — H———. Our reading of *Doe*, however, leads us to conclude that the Utah court did not rule on the validity of defendants' parental consent regulations with respect

to the constitutional right of privacy or the federal statutory restrictions that are the subject of this case. Accordingly the law of the case has not been established by the United States Supreme Court's summary dismissal of the appeal from that case.

We hold first that the state's regulations impermissibly engraft upon AFDC and Medicaid eligibility requirements a condition in conflict with the provisions of the Social Security Act. Second we hold that the state's regulations infringe upon the plaintiff's right to privacy unjustified by any compelling state interest in regulation.

I.

As a preliminary matter, the defendants request the appointment of a guardian ad litem to represent the plaintiff T———— H———— in this litigation in accordance with Fed. R. Civ. P. 17(c). The pertinent portion of that Rule is as follows:

> The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Neither the appointment of a guardian ad litem nor a protective order in lieu of such appointment is mandatory so long as we determine that the plaintiff is adequately protected in this litigation without a guardian. Jacobs v. Board of School Comm'rs, 7 Cir., 490 F2 601, 604, *vacated as moot*, 43 U.S.L.W. 4238 (US. Feb. 18, 1975); Roberts v. Ohio Cas. Ins. Co., 5 Cir., 256 F2 35,

39; Rotzenburg v. Neenah Joint School Dist., E.D. Wisc., 62 F.R.D. 340. We have considered the following facts in making that determination. First, the plaintiff in this action asserts her own statutory and constitutional rights independent of her parents, who are her guardians under Utah law. Second, the plaintiff does not seek monetary relief but raises statutory and constitutional claims aimed at declaratory and injunctive relief. Third, the plaintiff is represented by able and experienced counsel. These circumstances, we believe, eliminate the need for appointment of a guardian ad litem or other protective order. Jacobs v. Board of School Comm'rs, *supra*, 490 F2 at 604; Rotzenburg v. Neenah School Dist., *supra*. We therefore refuse defendants' request.

II.

States that desire to take advantage of the substantial federal assistance funds from the AFDC and Medicaid programs are required under 42 U.S.C. §§ 601 and 1396 to submit plans for approval of the Secretary of HEW. These plans must conform with the requirements of the Social Security Act and with relevant regulations promulgated by HEW. 42 U.S.C. §§ 602, 1396a; King v. Smith, 392 U.S. 309. Although the states have considerable latitude in shaping these assistance programs, they may not depart from pertinent federal statutory and administrative guidelines. Thus the Supreme Court has repeatedly held that state AFDC eligibility standards that exclude persons eligible for assistance under federal AFDC guidelines violate the Social Security Act, 42 U.S.C. § 602(a)(10), and are therefore invalid under

the supremacy clause of the Constitution. Carleson v. Remillard, 406 U.S. 598; Townsend v. Swank, 404 U.S. 282; King v. Smith, 392 U.S. 309. Most recently the Supreme Court has held in a per curiam opinion that state regulations may not, consistent with this line of cases, engraft upon AFDC eligibility requirements a condition in conflict with 42 U.S.C. § 602(a), which sets forth standards for state AFDC plans. Lascaris v. Shirley, 43 U.S.L.W. 4422 (U.S. March 19, 1975). Although none of these cases deals directly with the validity of state limitations on the provision of federally-funded family planning services through AFDC or Medicaid, we believe that the principle of review is the same: to the extent that the states impose conditions on the provision of these services in conflict with federal standards, the latter must prevail.

We turn now to the specific federal standards claimed by plaintiff to conflict with the state's regulations FPX 120, FPC 120, and 3.7(c). 42 U.S.C. § 602(a)(15) provides in part that state plans for the administration of AFDC must provide

> for the development of a program, for each appropriate relative and dependent child receiving aid under the plan . . . for preventing or reducing the incidence of births out of wedlock for implementing such program by assuring that in all appropriate cases (including minors who can be considered to be sexually active) family planning services are offered to them and are provided promptly . . . to all individuals voluntarily requesting such services. . . .

We observe two salient features of this provision, which was among the 1972 amendments to Title IV A of the Social Security Act. First, the purpose behind Congress' requiring the states to provide family planning assistance is the prevention of births out of wedlock and, thereby, the strengthening of family ties. Second, the sole expressed precondition to the state's obligation to provide such services to sexually active minors is that such persons voluntarily request family planning assistance. These observations find support in HEW regulations promulgated under Title IV A, as amended. In particular we note that those regulations require participating states to offer and provide family planning services to

> those individuals wishing such services, specifically including medical contraceptive services (diagnosis, treatment, supplies, and followup) . . . . *Such services must be available without regard to marital status, age, or parenthood.* Individuals must be assured choice of method and there must be arrangements with varied medical resources so that individuals can be assured choice of source of service. . . . 45 CFR § 220.21. (Emphasis added,)[1/]

The 1972 amendments to the Medicaid provisions of the Social Security Act (Title XIX) similarly appear

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[1/] With respect to the purpose behind requiring provision of family planning for appropriate AFDC recipients, 45 CFR § 220.20 provides:

> There must be a program to prevent or reduce the incidence of births out-of-wedlock and to otherwise strengthen family life. Services to prevent and reduce births out-of-wedlock must be extended progressively to all appropriate adults and youths, with initial priority . . . for youths living in conditions immediately conducive to births out-of-wedlock.

to limit the state's power to impose conditions upon eligibility for family planning assistance. 42 U.S.C. § 1396a (a) (8) requires participating states to provide "medical assistance" to all "eligible individuals." The term "medical assistance" is defined in section 1396d(a)(4)(C) as

> payment of part or all of the cost of
>
> ******
>
> family planning services and supplies furnished . . . to individuals of child-bearing age (including minors who can be considered to be sexually active) who are eligible under the State plan and who desire such services and supplies . . . .

Standards of Medicaid eligibility are set forth in section 1396a(a)(10). Part (A) of section 1396a(a)(10) denominates the recipients of various Social Security Act assistance programs as eligible individuals; included are AFDC recipients under Title IV A of the Act. Section 1396a(a)(13)(B) further requires state plans to provide family planning services, as defined by section 1396d(4)(C), to recipients of AFDC benefits, making the provision of other medical services optional with respect to AFDC recipients.

Thus, we read the 1972 Medicaid amendments to establish two preconditions to the state's obligation to provide family planning assistance to sexually active minors. First, such persons must be eligible under the standards of section 1396a(a)(10); second, such persons must vol-

untarily request assistance.[2/] HEW regulations promulgated under Title XIX permit states further to limit family planning services and supplies "to individuals of child-bearing age (including minors who can be considered to be sexually active) who desire such services"; but family planning services must otherwise be "made available to any categorically needy individual included under the plan." 45 CFR § 249.10(a)(6)(vi).

Our reading of the 1972 amendments to the Social Security Act leads us to conclude that the challenged Utah regulations, which require parental consent before minors may receive family planning assistance under the AFDC and Medicaid programs, are in conflict with these federal standards. The state's regulations impermissibly engraft upon the federal scheme a condition for eligibility where Congress has undertaken fully to define the class of persons who may receive family planning assistance. The legislative history of the 1972 amendments bears out Congress' concern that AFDC and Medicaid family planning services be provides to sexually active minors who desire them on a confidential basis; in this way Congress has sought to stem the rising number of births out of wedlock and consequent increase in number of welfare re-

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[2/] 45 CFR § 249.10(a)(9) provides that Title XIX plans must ensure, with respect to family planning services,

> that there shall be freedom from coercion or pressure of mind and conscience, and freedom of choice of method, so that such individuals can choose in accordance with the dictates of their consciences.

cipients.[3]/ Utah's regulations, although undoubtedly motivated by the state's concern for the integrity of the family, nevertheless run afoul of the policies of confidentiality

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[3]/Commenting on section 299E of the Senate bill amending Title IV A and XIX of the Social Security Act, the Senate Finance Committee reported:

> The committee amendment would authorize States to make available on a voluntary and confidential basis family planning counseling, services, and supplies, directly and/or on a contract basis with family planning organizations (such as Planned Parenthood clinics and Neighborhood Health Centers) throughout the State, to present, former, or potential recipients including any eligible medically needy individuals who are of child-bearing age and who desire such services.
>
> * * * *
>
> The Secretary would be required to work with the States to assure that particular effort is made in the provision of family planning services to minors (and non-minors) who have never had children but who can be considered to be sexually active; for example, persons who have contracted venereal diseases, etc.
>
> * * * *
>
> Because of the difficulties of enforcing or monitoring the mandatory provision of family planning services to former or potential recipients, the penalty provision will be limited to the offering and provision of services to present adult recipients of AFDC and workfare. However, family planning services must be offered and made available on an optional basis to former and potential recipients of child-bearing age.
>
> It is envisioned that individuals of child-bearing age applying for or receiving AFDC would formally acknowledge that they have been informed that they are eligible to receive family planning services on a voluntary and confidential basis. If they desire family planning services, an appointment would be set up at that time and a copy of the form would be sent to the clinic or physician providing necessary services and supplies. This would not preclude "walk-in" requests for family planning assistance by present and former recipients or those likely to become recipients in the absence of such services. S. Rep. No. 92-1230, 92d Cong. (1972).

and comprehensive assistance to sexually active minors embodied in the 1972 amendments.

The state of Utah argues, however, that noncompliance with federal family planning assistance standards merely provides grounds for cutbacks in federal funds after review by the Secretary consistent with 42 U.S.C. § 604, but does not provide a basis for injunctive relief against offending state regulations. The Supreme Court rejected this argument in Rosado v. Wyman, 397 U.S. 397. The Court stated, "We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." *Id.* at 420. Although King v. Smith, *supra,* did not specifically advert to the remedial problem, the *Rosado* Court continued, the unarticulated premise of that case was that "the State had alternative choices of assuming the additional cost of paying benefits to families [not eligible under challenged state regulations] or not using federal funds to pay welfare benefits according to a plan that was inconsistent with federal requirements." *Id.* at 420-21. In these cases and others the Court has consistently acknowledged the right of recipients of federal assistance to challenge the validity of state restrictions affecting the scope of and conditions placed upon their receiving federal assistance.

The state also argues that HEW's approval of its plan -- including its express approval of the challenged regulations -- must be considered in determining the valid-

ity of the plan under federal standards.[4/] We agree. But the principle that accords substantial weight to the interpretation of a statute by the department entrusted with its administration does not apply where the department's approval is so clearly inconsistent with federal statutory language and legislative policy. *See* Townsend v. Swank, 404 U.S. 282, 286. Indeed, it appears that HEW sometimes approves state plans that it concedes to be in conflict with its own regulations, perhaps on the premise that the state departures from federal standards are not substantial enough to justify disapproval by the Secretary. *See, e.g.,* Carleson v. Remillard, 406 U.S. 598, 602 and n.3; King v. Smith, 392 U.S. 309, 334-35 (Douglas, J., *concurring*). We are convinced, however, that the conflict between Utah's parental consent regulations and federal requirements constitutes an important disagreement affecting the scope and effect of federal family planning assistance. Under such circumstances, federal law must control.

[4/] In response to an inquiry by defendant Evan E. Jones, Jr., Director of Utah's Division of Family Services, to HEW's Regional Office, Associate Regional Commissioner Ray Myrick, Jr., responded on September 20, 1974 as follows:

> Under 45 CFR 220.21 family planning services must be offered and provided to those individuals requesting such services. Such services must be available without regard to maritial status, age, or parenthood. However, where State law stipulates a specific age of consent, such services may not be provided any more than any medically related service, without parential consent.

We are unable to find any state law that requires the consent of parents before minors may obtain family planning services or supplies. *See* Doe v. Planned Parenthood Ass'n, 29 Utah 2d 356, 360, 510 P2 75, 77 (Tuckett, J., *dissenting*).

III.

We turn now to plaintiff's claim that Utah's parental consent regulations impermissibly burden her constitutional right to privacy and are for that reason invalid. we proceed by determining first whether the constitutional privacy doctrine prevents the state generally from imposing restrictions upon access to family planning services and contraceptive supplies; second, whether the right to privacy--if inclusive of freedom from state interference in matters of family planning and use of contrceptives--extends to minors; and third, whether the state has shown a compelling interest that justifies its parental consent regulations.

The Supreme Court has never determined whether the constitutional right of privacy developed in Griswold v. Connecticut, 381 U.S. 479, and succeeding cases includes the right to obtain family planning services and materials free from unjustified government interference. In Eisenstadt v. Baird, 405 U.S. 438, the Court expressly refused to decide whether individuals have a right of access to contraceptives. The Court nevertheless stated,

> If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. *Id.* at 453.

In Roe v. Wade, 410 U.S. 113, in which the Texas criminal abortion statute was held to violate a woman's fundamental right to decide whether she would bear a child, the

Court further acknowledged that the same right to privacy "has some extension to activities related to . . . contraception." *Id.* at 152. If, as *Roe* teaches, the fourteenth amendment protects a woman's right to decide whether she will terminate her pregnancy, it must also, we believe, protect her right to take measures to guard against pregnancy. In either instance the woman's interest is the same, that is, to make fundamental personal decision about sexual conduct and procreation free from state interference. We are convinced, therefore, that the right to privacy underlying the Supreme Court's decision in Roe v. Wade prevents the state from intruding, without justification, into the decision of adults whether to obtain and use contraceptive devices and whether to seek out counseling in family planning matters.

A more difficult question is whether the right to privacy as we have described it extends to minors such as the plaintiff in the present action. The Supreme Court has consistently recognized as a general principle that the Bill of Rights and the fourteenth amendment protect children as well as adults from unjustified state action. *See, e.g.,* Breed v. Jones, 43 U.S.L.W. 4644 (U.S. May 27, 1975); Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 506; In re Gault, 387 U.S. 1, 13; Prince v. Massachusetts, 321 U.S. 158, 165-66. The Court has nevertheless recognized that the state may legitimately curtail the rights of children where it acts to protect children from their own incapacity to fend for themselves. *See* Prince v. Massachusetts, *supra,* 321 U.S. at 168-70. In the present case, however, the state can assert no such interest in protecting sexually active minors from

dangers that may be entailed in the use of contraceptives. The UPPA employs social workers, licensed physicians and other trained personnel to examine and counsel minors seeking contraceptives. These circumstances, we believe, afford adequate protection to minors from physical harms associated with birth control.

More importantly, we perceive no developmental differences between minors and adults that may affect the gravity of the right asserted by sexually active minors to family planning services and materials. The interest of minors in access to contraceptives is one of fundamental importance. The financial, psychological and social problems arising from teenage pregnancy and motherhood argue for our recognition of the right of minors to privacy as being equal to that of adults. This is not to say that the state may not regulate that right in pursuit of some compelling interest of its own; rather, we hold that the fundamental nature of minors' right to privacy must be considered in assessing the constitutionality of state-imposed restrictions on access to contraceptives. In Doe v. Rampton, D. Utah, 366 F. Supp. 189, this court implicitly recognized that the constitutional right to privacy extended to minors. There we held that Utah law impermissibly required parental or spouse consent before minors could receive abortions during the first trimester of pregnancy. Other courts have similarly recognized that the fourteenth amendment guarantees to minors as well as adults the freedom to make basic decisions about sexual conduct and procreation without unjustified interference from the state. Foe v. Vanderhoof, D. Col., No. 74-F-418 (February 5, 1975); Coe v. Gerstein, S.D. Fla., 376 F.

Supp. 695; State v. Koome, 84 Wash. 2d 901, 530 P. 260.

With respect to both minors and adults, the right to personal privacy is not absolute but must be considered against important state interests in regulation. Roe v. Wade, *supra,* 410 U.S. at 154. The state may regulate plaintiff's access to contraceptives with measures narrowly drawn to achieve some compelling state interest. *Id.* at 155. The question for us becomes whether Utah' challenged parental consent regulations are supported by any such interest.

The state argues in this respect that it has a "substantial" interest in protecting minor females "from the evil effects and unsuspected harm of actions which go against the mores of society" and in enforcing the right of parents to control the family. For a number of reasons we must hold that neither of these justifications is so compelling as to override the plaintiff's constitutional right to privacy. First, we note that Utah law does not prohibit minors more affluent than plaintiff from obtaining contraceptive materials from their personal physicians even absent parental consent; the challenged regulations, in effect, burden the fundamental rights of indigent minors only.[5/] Thus, even if we were to sustain the state's

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[5/] Except for the regulations challenged in this action, which apply only to indigent minors seeking family planning services from the UPPA, Utah law does not apparently prohibit or restrict physicians from prescribing contraceptives for minors. The defendants argue that various state statutes must be read as implying that all minors must obtain parental consent before obtaining contraceptive devices. The defendants point primarily to Utah Code Ann. §§ 75-2-1 *et seq.*, which specify the age of majority and provide for rescission of contracts made by minors,

regulations in their effect upon plaintiff's privacy, they would nevertheless be subject to attack on equal protection grounds. *See* Griswold v. Connecticut, 381 U.S. 479, 485; Eisenstadt v. Baird, 405 U.S. 438, 453. More importantly in the present context, the failure of the state legislature to enact restrictions upon the access of minors —rich and poor—to contraceptives seriously undercuts the state's claim that its family planning regulations embody compelling public interests.

Second, although parental prerogatives are entitled to considerable legal deference, they frequently must yield to valid interests of the state, for example, in enforcing compulsory education in regulating child labor in preventing parental neglect and in providing for the general health. *See* Prince v. Massachusetts, 321 U.S. 158, 166. *See also* Utah Code Ann. §§ 55-16-1 *et seq.* (child abuse), 55-10-77 (parental neglect), 34-22-1 (child labor), 53-24-1 *et seq.* (compulsory education), 26-6-39.1

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and to Utah Code Ann. § 26-6-39.1, which permits treatment of minors for venereal disease without parental consent. These statutes, in our view, cannot be read either to restrict physicians in prescribing contraceptives or to create a legal disability in minors seeking contraceptives. The defendants also note Utah Code Ann. § 58-19-9 prohibits licensed retailers from selling "prophylactics" to persons eighteen years of age or under. We note that the term "prophylactic" is defined as "[a]ny device, appliance or medical agent used in the prevention of venereal disease." Id. § 58-19-1(f). The statute thus has doubtful application to contraceptive devices used by women. We also observe that § 58-19-2 excepts physicians from the restrictions on sale imposed by § 59-19-9.

In his dissenting opinion in Doe v. Planned Parenthood Ass'n, 29 Utah 2d 356, 360, 510 P2 75, 77, Justice Tackett observed that the Utah legislature has never restricted minors from obtaining contraceptives. The court's majority was apparently of the same view. 510 P2 at 77 n.6.

(treatment of venereal disease). Likewise, we believe that, in appropriate cases, the state's interest in enforcing parental prerogatives must yield to the fundamental rights of minors. *See* Rowan v. Post Office Dept., 397 U.S. 728, 741 (Brennan, J., *concurring*).

To the extent that the plaintiff and her class must consult with a physician before receiving prescription contraceptives and avail themselves of the UPPA's family planning counseling, these youths will be aided by the mature judgment of trained adults before making important decisions regarding sexual conduct. Unlike the abortion decision, a youth's decision to use contraceptives is not irrevocable. Nor does our insistence upon the right of privacy of minors preclude continuing guidance of parents and family in the personal lives of minors. Rather we hold that the state may not enforce the choice of parents in conflict with a minor's constitutional right of free access to birth control information and services. This is not to say, of course, that the state may not require notification to parents or guardians before minors receive such services. *See* Roe v. Rampton, D. Utah, No. C-74-344(March 18, 1975). Such a requirement, however, must be applied non-discriminatorily to all youths, and not merely those too poor to seek out family planning services on their own.

Accordingly, it is hereby determined that Regulations FPX 120, FPC 120, and 3.7(c) of the Utah State Division of Family Services are unconstitutional and in violation of federal statute insofar as they require con-

sent of a parent or guardian before a minor may obtain family planning services, counseling, and supplies from the UPPA. Enforcement of these regulations must be enjoined.

Dated this 26 day of June, 1975.

/s/ David T. Lewis
David T. Lewis, Circuit Judge

/s/ Willis W. Ritter
Willis W. Ritter, District Judge

Aldon J. Anderson, District Judge

I have read the foregoing opinion and feel constrained to dissent. A dissenting opinion setting forth the reasons follows.

DATED this 22 day of July, 1975.

/s/ Aldon J. Anderson
Aldon J. Anderson, District Judge

APPENDIX B

[Filed July 22, 1975]

DISSENTING OPINION

The majority opinion bases its findings that Regulations FPX 120, FPC 120, and 3.7(c) of the Utah State Division of Family Services are invalid and unconstitutional on two grounds: (1) that the state regulations conflict with the federal statute and are therefore invalid under the supremacy clause of the Constitution, and (2) that the plaintiff has a constitutional right of privacy that has been unjustifiably infringed without a compelling state interest justifying it. Careful examination does not reveal a necessary conflict between the state regulations and federal statutes in question. Further, the majority's newly defined constitutional right for minors to receive contraceptives without parental consent seems an unwarranted and unwise extension of the right of privacy as well as an unjustified curtailment of the rights of parents.

SUPREMACY CLAUSE

Whether the state regulations impermissibly conflict with the federal statutes in question is a matter of statutory construction. Basic rules of statutory construction require that statutes and regulations be given a sensible interpretation that will accomplish the legislative intent and avoid an illogical conclusion or unreasonable result. Where possible, statutes and regulations should be

upheld and operative language be given effect. It is believed the interpretation herein contended for conforms to those standards and that there is no conflict between the regulations and statutes in question.

In its consideration of the statutes and regulations in question, the majority has overlooked pertinent words in the federal statutes and relevant federal regulations which allow a harmonious construction with the state regulations. The two federal statutes in question are 42 U.S.C. § 602(a)(15) and 42 U.S.C. § 1396d(a)(4)(C). Plaintiff argues these statutes mandate that family planning services be given to her. Both statutes, however, contain words of qualification which can be interpreted as giving some definitional leeway in determining who should receive family planning services. 42 U.S.C. § 602(a)(15) provides in part:

> (a) A State plan for aid and service to needy families with children must:
>
> * * *
>
> (15) . . . [provide a program] for preventing or reducing the incidence of births out of wedlock and otherwise strengthening family life, and for implementing such program by assuring that *in all appropriate cases* (including minors who can be considered to be sexually active) family planning services are offered to them and are provided promptly (directly and under arrangements with others) to all individuals voluntarily requesting such services. (Emphasis added.)

42 U.S.C. § 1396d(a)(4)(C) defines "medical assistance" to mean payment of part or all of the costs of

> family planning services and supplies furnished . . . to individuals of child-bearing age (including minors who can be considered to be sexually active) *who are eligible under the State plan* and who desire such services and supplies; (Emphasis added.)

In 42 U.S.C. § 1396d(a)(4)(C) the discretion of the state is clearly recoginzed as eligibility under the state plan is set out as a condition to payment of part or all of the cost of medical assistance as therein defined. The phrase "in all appropriate cases" in 42 U.S.C. § 602(a)(15) also is indicative of state discretion in defining program eligibility when read in light of the federal statutes promulgated thereunder. The federal regulation applicable to § 602(a)(15) provides that a state plan can qualify the families and children who may receive mandatory family planning services. 45 C.F.R. 220.15 (1974) states:

> The State plan:
>
> (a) Must assure that responsibility is assumed *for the provision of services to all appropriate persons receiving aid* and others in the homes whose needs were considered in determining eligibility for such aid, as called for under each of the requirements in §§ 220.16-220.25; and
>
> (b) *Must be specific in its identification of the services to be provided or purchased and the families and children to whom they will be available.* (Emphasis added.)

Further, as it relates to the parental consent requirement in the Utah service plan, 45 C.F.R. § 220-16(c)

provides that the *family* (not merely a minor child within a family) shall have the right to accept or reject particular state plans. It states:

> Such plans must be developed in cooperation with the family and must be responsive to the needs of each individual within the family, while taking account of the relation of individual needs to the functioning of the family as a whole. ***Families shall have the right to*** accept or reject such plans. (Emphasis added.)

Further support of the philosophy of voluntariness and the right of the family to elect whether or not to participate in family planning services is seen in 45 C.F.R. § 220.21 which states in part:

> Acceptance of any [family planning] services must be voluntary on the part of the individual and may not be a prerequisite or impediment to eligibility for the receipt of any other service of aid under the plan.

Thus, federal regulation 45 C.F.R. § 220.15 makes it clear that the states do have leeway to identify "the families and children" to whom family planning services will be available, and 45 C.F.R. § 220.16(c) makes it equally clear that *families* have the right to reject such plans. The mandatory aspect of these services appears to be that the families involved are made aware of the availability of the services and that the services be provided if requested. Congress's use of the qualifying language in terms of the "appropriate cases" along with the aforementioned federal regulations does not provide a language base for

concluding the decision of whether or not to acquire and use family planning services is to be left entirely to unmarried minor children in families receiving AFDC aid. Consistent with 45 C.F.R. § 220.16(c), the Utah plan provides family planning services to unmarried minor children with parental consent.

Contrary to the foregoing, the plaintiff, in sum, contends that the statutory language in question merely correlates particular services provided for by the Social Security Act between one group of persons for which the services are mandated and a second group of persons, that plaintiff claims is identified under the Act, who can receive some of the services available to the first group depending upon the peculiarities of the state plan involved. This complex explanation (which is not entirely clear as explained in plaintiff's brief) does not adequately explain the statutory language in question. Plaintiff puts a strained interpretation on words not carrying the plain signification claimed for them. Two strong arguments can be made against plaintiff's proposed construction of the statutes. (1) If the word "appropriate" and the phrase "who are eligible under the State plan" were stricken from the respective statutes, no change would be effected. The persons in the second categories, as identified by plaintiff, could still receive all the services for which they qualify even without these words in the statutes. Statutes should be construed in order that each word can be given effect rather than in a manner in which certain words are rendered meaningless. (2) If "appropriate" and "who are eligible under the State plan" were meant to qualify services that might be provided to the persons in the second

category, as identified by plaintiff, it would seem that such qualifying words would appear throughout the statute in order to qualify each of the services that could be, under the appropriate circumstances, provided to both groups of persons. However, these qualifying words appear only in connection with the family planning services, rather than in connection with all the various services that can be provided to both groups of persons. Further, with the evidence of precision in the use of words in the extensive and complicated statutes before the court, such phrases with the meaning ascribed to them by plaintiff would seem to be inartful. Reason would require the conclusion that the construction urged by plaintiff was not intended.

The word "appropriate" and the phrase "who are eligible under the State plan" are most logically construed as allowing Utah to exercise discretion in identifying those minors with parental consent as the only minors in the state to whom family planning services will be available. This is in accordance with 45 C.F.R. § 220.15 which provides that in assuming responsibility for the provision of services under the Act that the state plan must "be specific in its identification of . . . the families and children to whom they [the services] will be available," and with 45 C.F.R. § 220.16(c) which provides that families shall have the right to accept or reject particular state plans. Such an interpretation is consistent with the overall objectives of the Act as stated in 42 U.S.C. § 601 which provides that the appropriations were authorized for the purposes of encouraging the care of dependent children in their own homes and for the purpose of helping to

> maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with *the maintenance of continuing parental care and protection* . . . . (Emphasis added.)

Also, persuasive support for a construction upholding the Utah regulations is the interpretation of the Utah plan by the federal agency charged with the execution of the programs here under consideration. With all their administrative experience in sponsoring and enforcing such laws and regulations, the Department of Health, Education and Welfare, through its Regional Officer, approved Utah's plan with its parental consent requirement.[1/]

The Utah regulations can be held invalid under the supremacy clause of the Constitution only if they impermissibly conflict with federal law. There is no conflict in this case. The federal law anticipates a state program in which the needs of children are met with continuing parental care and protection and families are strengthened. The government offers the panoply of what it believes are essential services. The family determines which services it will use. 45 C.F.R. § 220.16(c). Under the federal plan, parents are afforded the flexibility to raise their families without the interference of an impersonal government that would, in the words of the majority, substitute

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1/ In addition, as noted by the majority opinion, the Utah Supreme Court also upheld the state plan in Doe v. Planned Parenthood Association of Utah, 29 Utah 2d 356, 510 P.2d 75 (1973), appeal dismissed 414 U.S. 805 (1973), against an attack based on ninth amendment and equal protection arguments.

the "mature judgment" of trained adults (presumably social workers) for parents. Whose judgment will determine that a particular social worker, perhaps a parent with his own problems, will better advise a minor on the use of contraceptives than the minor's parents? By what right may a social worker supplant the parent under the basic purposes of the Act? The construction contended for by plaintiff in this important aspect of child care and training would not strengthen the family nor would it "maintain continuing parental care and protection," as contemplated by the Act.

THE RIGHT OF PRIVACY

The legislative solution for preventing or reducing the incidence of births out of wedlock among sexually active minors who are AFDC recipients is presented in the statutes previously discussed herein and argued at length by plaintiff. In discussing plaintiff's asserted constitutional right of privacy, which is the majority's second ground for invalidating the Utah regulations in question, it should be born in mind that a critical distinction exists between (1) the desire of Congress to provide contraceptives to minors if it perceives such a need and (2) a minor's "right" to receive contraceptives under constitutional principles. A minor's need for contraceptives may be susceptible to legislative action, while a minor's right of access to contraceptives is certainly governed by different considerations -- the constitutional status of the right of privacy for minors in this context.

RIGHT OF PRIVACY

The constitutional right of access to contraceptives

for adults, to the extent it presently exists, has evolved under the court-created right of privacy. *See* Note, *Parental Consent Requirements and Privacy Rights of Minors The Contraceptive Controversy,* 88 HARV. L. REV. 1001, 1006 (1975). In *Griswold v. Connecticut,* 381 U.S. 479 (1965) the Court left open the possibility that a state might validly regulate distribution rather than use of contraceptives. No Supreme Court decision has held that minors have a fundamental right to contraceptives, and no Supreme Court decision has explicitly held that this claimed right of privacy is even applicable to minors. 88 HARV. L. REV. at 1009. In this case, however, the majority has held that the right to privacy prevents the state from intruding, without justification, into the decision of the minor to obtain and use contraceptives; that the interest of minors in access to contraceptives is one of fundamental importance; that Utah's parental consent regulations are not supported by a compelling state interest, and therefore are constitutionally invalid. The extrapolation which leads the majority to these conclusions ignores significant familial interests which have been fundamentally at the root of our society.

Justice Oliver Wendell Holmes wrote that "[t]he life of the law has not been logic: it has been experience."[2/] While the Griswold case has been argued by some as a logical base for holding that a right of privacy gives a minor a fundamental right to contraceptives, such a conclusion is not supported by experience, nor on close examination does logic support this argument even within the majority's own conceptual framework.

[2/] O. W. HOLMES, THE COMMON LAW 1 (1881).

Although never explicitly determined by the Supreme Court, many have concluded from recent right of privacy decisions that the right of privacy does comprehend the right of adults to obtain contraceptives and other birth control information free from unnecessary state interference.[3/] While the rights of adults are not specifically at issue in this case, a conclusion of their right to contraceptives is a requisite step in the logical consideration of minor's rights. The majority thus concludes on the proposition that there exists a fundamental right of access to family planning information and material lodged in adults under the constitutional rubric of the right of privacy.

The next step of the majority's analysis is the conclusion that this privacy right of access to contraceptive materials extends to minors. As to this conclusion, basic principles require disagreement. By long-standing and significant precedent it is clear that constitutional guarantees found in the Bill of Rights and the clauses of the Fourteenth Amendment operate to the protection of minors as well as adults. *See, e.g., In re Gault,* 387 U.S. 1 (1967); *Goss v. Lopez,* 419 U.S. 565 (1975). And it is also an established principle that fundamental constitutional rights accorded adults may be limited in their extension to minors, particularly when capacity is at issue.[4/] *See Ginsberg v. New York,* 390 U.S. 629 (1968), *reh. den.,* 391 U.S. 971 (although written in constitutional language, that decision is not explicitly premised on the

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[3/] Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973).

[4/] The majority is in agreement with this view. Supra at 11.

First Amendment rights of minors); *Oregon v. Mitchell*, 400 U.S. 112, 119-31 (1970).

The majority properly recognizes that "capacity" is the distinguishing feature in understanding the different approaches utilized by the Supreme Court in extending constitutional rights to minors. It states that

> [t]he Court has nevertheless recognized that the state may legitimately curtail the right of children where it acts to protect children from their own *incapacity to fend for themselves.* (Emphasis added.) *Supra* at 11-12.

Thus, where capacity of the minor child is not an issue in the exercise of a particular fundamental right, the Court has applied constitutional protection for minors with substantially identical force. *See Tinker v. Des Moines Ind. Com. School Dist.*, 393 U.S. 503 (1969) (First Amendment rights of students to wear anti-Viet Nam war armbands to school upheld); *In re Gault*, 387 U.S. 1 (1967) and *Breed v. Jones*, 43 U.S.L.W. 4644 (May 27, 1975) (both extending criminal process rights to minors); *Goss v. Lopez*, 419 U.S. 565 (1975) (procedural rights guaranteed prior to suspension from public high school(. However, other "fundamental" rights have not been identically applied to minors when capacity is at issue. Thus, the right to vote, deemed fundamental, is not accorded to minors though a substantial number of minors undoubtedly have the capacity to exercise that right with superior ability in comparison to many adults. *See Oregon v. Mitchell*, 400 U.S. 112, 119-31 (1970) (denying right to vote to 18 year olds in state elections). Minors are also denied rights

of access to allegedly pornographic materials which some court decisions have allowed adults under the First Amendment. *See Rowan v. United States Post Office Dept.*, 397 U.S. 728, 738 (1970) (parent may reject mailed material from being sent to minor members of family);[5/] *Ginsberg v. New York, supra* (standards of obscenity different for minors). The underlying though not explicit prem se of these cases is that where capacity is an issue, i.e., that the judgment required in the exercise of the right is such that a substantial number of the class of minors involved lack the mental and emotional capacity to effectively make that judgment, the state may limit in a number of ways the exercise of those rights by minors. And, similarly, when capacity is not at issue in the exercise or entitlement of rights, such as criminal process or due process rights, there is then no justification for state limitation or infringement of those rights.

It is not, however, with the significance of "capacity" that gives so much concern, but with the majority's definition. After noting the constitutionally permissible limitations which states may impose to protect minors "from their own incapacity to fend for themselves," the majority opinion goes on to state that

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5/ The majority cites to Justice Brennan's concurring opinion in Rowan for the proposition that parental prerogatives "must yield to the fundamental rights of minors." However, the language of the Court, while admittedly terse because of "no particularized attack" on that provision, indicates that a householder need not "risk that offensive material come into the hands of his children before it can be stopped." 397 U.S. at 738. Thus, Rowan stands as precedent, though somewhat tenuously so, for the proposition of the diminished rights of minors in families where capacity is at issue, notwithstanding Justice Brennan's concurrence.

> [i]n the present case, however, the state can assert no such interest in protecting sexually active minors from dangers that may be entailed in the use of contraceptives. *Supra* at 12.

Thus, it appears that the majority equates "capacity to fend for oneself" with "sexually activity," and holds that any sexually active minor has the capacity to make the contraceptive decision. Such an equation seems oblivious to the precedential and linguistic meaning of "capacity" and of the traditional protection of minors afforded by state law. It can hardly be contested that a minor's decision to use contraceptives involves intellectual, emotional, and moral factors as well as the physical factor. Nonetheless, the majority, disregarding these other factors, has limited their observation in this respect to the risk of "physical harms" resulting from the practice of birth control. Consequently, the conclusion that the state can assert no interest in protecting sexually active minors from the use of contraceptives, because they have capacity, seems based a false assumption.[6/]

Since capacity is at issue here, and requires consideration of more than the level of a particular minor's sexual

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6/ As noted earlier, there is a distinction between the *needs* of some minors for family planning materials and the *rights* of some minors to those materials. The majority's emphasis on preventing physical harms addresses the needs of some minors so endangered. However, the right, if any, of minors to those materials is based on capacity, of which need is not a function. Thus, the majority's reference to sexually active minors as those whose interests cannot be infringed is a legislative conclusion, since it responds to needs, rather than a judicial one, which would respond only to the rights involved. The right of privacy claimed here does not give occasion to consider the needs of minors in its calculation.

activity or ability, it remains to determine what applicability the right of privacy has for minors claiming family planning assistance. One possible analytical approach is to define the two groups of minors whose interests appear to be raised by limitations on contraceptive access, whether by parental consent requirements or otherwise. The first group are those minors with the capacity to make the contraceptive decision who would choose to obtain family planning materials, referred to as those "with capacity." The second group are those minors clearly lacking the capacity to effectively make the contraceptive decision who would choose also to obtain family planning materials to their injury, referred to as those "lacking capacity." The former arguably suffer the possible deprivation of a constitutional right; the latter suffer the possible consequences of an erroneous decision. It is in the light of these competing interests that the claimed right of minors to contraceptives must be evaluated. First, the interests of those two groups must be defined and weighed, if possible, i.e., whether the interest of the first group, those with capacity, is of significantly larger dimensions than that of the latter group to warrant denominating the right to contraceptives as fundamental for all minors. It is clear that no such conclusion can be drawn in the absence of supporting empirical evidence of plaintiff's position and without a more persuasive logical position on the face of the arguments themselves. Thus, as in cases such as *Oregon v. Mitchell* and *Ginsburg*, the presence of a critical capacity issue precludes extending this right of access to contraceptives, as a fundamental right, to all minors. And the relative interests of those

minors with capacity cannot of their own weight and constitutional substance bootstrap the right for all minors, in light of the competing interests and claims discussed above. Therefore, the right of privacy, insofar as it may include the right of unhindered access to contraceptives for adults, does not extend to minors as a fundamental right.

This conclusion is in accord with the analogy to the legislative decision, in the area of voting rights, to deny *in toto* the right of minors to vote, which has been sustained by the Supreme Court, notwithstanding the strong argument of the existence of a substantial number of minors with capacity. *See Oregon v. Mitchell, supra.* Consequently, given the conclusion that the right of minors to family planning assistance is not a fundamental one, the traditional approach of courts is to see if there is a reasonable basis for such a statutory limitation. *See San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 40-59 (1973); *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1077-87 (1969). In light of the very strong societal interest in protecting minors lacking capacity from the potential injuries resulting from erroneous decisions,[7/] the parental consent requirement invoking the guidance and judgment of parents has such a reasonable basis.

7/ Although difficult to quantify, it seems a safe assumption that injuries of various kinds and severity might occur to a minor who makes a personally incorrect decision to use contraceptives. The emotional and moral context of that decision, and the increased sexual activity which is likely to occur in some cases, may be taken to have a potential for serious damage for some minors. Such an assumption can, for this case, be noted and given weight without a precise calculation of its perimeters.

The parental consent requirements also recognizes the traditional role of the family in society.

> The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations . . . upon the availability of sex material to minors under 17 . . . *First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents,* whose primary function and freedom include the preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts, supra,* at 166. The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. . . . Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children. *Ginsburg v. New York,* supra at 639. (Emphasis added.)

It seems incongruous to assign to parents the role of instruction, on matters of morality and citizenship as well as other areas, and then deprive them of that role in the instance of opting to use contraceptives. Consequently, the parental consent requirement does not unconstitutionally infringe the rights of those minors with capacity, while reflecting substantial interests which persuasively

weigh in its favor over a state counselor approach even assuming the "mature judgment" spoken of in the majority opinion.

EQUAL PROTECTION

The majority opinion also notes that "even if we were to sustain the state's regulation in their effect upon plaintiff's privacy, they would nevertheless be subject to attack on equal protection grounds" because there is no state law prohibiting distribution of contraceptives to all minors. This argument, while not relied upon by the majority nor elaborated in any detail, appears to be based on the assumption that family planning assistance is denied to the poor while available to the affluent. Under that assumption, such a statutory scheme would be subject to two challenges. The first is based on wealth discrimination. However, the Supreme Court has recently ruled that wealth is not a suspect classification. *See San Antonio Independent School Dist. v. Rodriguez, supra* at 18-28. Thus, only a reasonable basis need be found for the apparent distinctive treatment embodied in the state plan. The second challenge is that an important right (whether or not deemed fundamental) is denied to some while granted to others with no apparent justification. The problem with that argument is that those in plaintiff's position who come under the various federal programs here involved are not denied access to contraceptives. Rather, they are only denied family planning materials through the particular program for which the state plan was adopted where the parents do not consent. It remains for those in plaintiff's position to obtain contraceptive material and information from the same sources as "fluent" minors, if state law so allows. Thus, the only challenge is the wealth discrimination challenge. And it is a reasonable basis for such a state plan that the state choose not to be involved in the distribution of contraceptive materials to minors. State statutes condemn sexual relations with minors. See e.g., UTAH CODE ANN. § 76-53-19 (1953) (a felony to have carnal knowledge of a minor). Further, a common factual predicate for a determination of a "delinquent child" or contributing to the delinquence of a minor, is unlawful sexual activity. Thus, an equal protection challenge to the state's plan requiring parental consent fails as well.

As quoted above by the United States Supreme Court in *Ginsberg v. New York, supra* at 639:

> . . . constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. "It is cardinal with use that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include the preparation for obligations the state can neither supply nor hinder."

It is believed that the regulation of the state which requires parental consent in this important area or moral training is justified under the law. I, therefore, feel constrained to dissent.

DATED this 22nd day of July, 1975.

/s/ Aldon J. Anderson, District Judge

Aldon J. Anderson, District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

No. C 74-276

[Filed August 7, 1975]

JUDGMENT

T..... H....., on behalf of herself, and all other persons similarly situated,

Plaintiff,

v.

EVAN E. JONES, JR., individually and in his capacity as the Director of the Utah State Division of Family Services; PAUL S. ROSE, individually and in his capacity as the Executive Director of the Utah State Department of Social Services; and THE PLANNED PARENTHOOD ASSOCIATION OF UTAH, a Utah non-profit corporation,

Defendants.

This Court having heretofore filed its Opinion, containing its Findings of Fact and Conclusions of Law, now hereby makes and enters the following judgment:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The plaintiff is a representative of a proper class comprised of all minors who are eligible for family planning information, counseling services and supplies which must be provided by the defendants pursuant to the provisions of Section 602(a)(15) and Section 1396a (a)(8) and Section 1396(d)(a)(4)(c) of Title 42 U.S.C.

and Sections 220.20, 220.21 and 249.10(a)(6)(VI) of Title 45, C.F.R. who have been prohibited from receiving said services and supplies as a result of the promulgation and enforcement by the defendants of the regulations herein declared invalid, to-wit: FPX 120, FPC 120, and 3.7(c) of the Utah State Plan for the Provision of Social and Medicaid Services.

2. The regulations promulgated and enforced by the defendants, to-wit: FPX 120, FPC 120 and 3.7(c) of the State Plan for Providing Social and Medicaid Services requiring family planning information, counseling, services and supplies to be given to a minor only upon receipt of the written consent of the parents of said minor are invalid being in violation of:

(a) The right to privacy of the plaintiff and all others similarly situated as guaranteed by the Fourteenth Amendment to the Constitution of the United States without the justification of a compelling state interest in said regulations; and

(b) Sections 602(a)(15), Section 1396(a)(8) and Section 1396 (d)(a)(4)(C) of Title 42, U.S.C.; and

(c) Sections 220.20, 220.21 and 249.10(a)(6)(vi) of Title 45, Code of Federal Regulations.

3. The defendants, their agents, employees, and successors in office are hereby enjoined and prohibited from enforcing regulations FPX 120, FPC 120, and 3.7 (c) of the Utah State Plan for the Provision of Social and Medicaid Services requiring that family planning information, counseling, services and supplies be given to a minor only upon receipt of the consent of parents of said minor.

4. The defendants, their agents, employees, and successors in office are hereby enjoined and prohibited from requiring any agency or organization with whom they have contracted for the provision to eligible persons for family planning information, counseling services and supplies from requiring that the agents and employees of said agencies or organizations require minors be given family planning information, counseling services and supplies only upon receipt of the consent of the parents of said minors.

DATED this 7th day of August, 1975.

/s/ David T. Lewis
David T. Lewis, Chief Judge
United States Court of Appeals
For The Tenth Circuit

/s/ Willis W. Ritter
Willis W. Ritter, Chief Judge
United States District Court
For the District of Utah

I respectfully dissent.

/s/ Aldon J. Anderson
Aldon J. Anderson, District Judge
United States District Court
For the District of Utah

Approved as to form:

/s/ David S. Dolowitz
David S. Dolowitz
Attorney for Plaintiff

Frank V. Nelson
Assistant Attorney General
Attorney for Defendant

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Case No. C 74-276

[Filed August 28, 1975]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

T..... H....., on behalf of herself, and all other persons similarly situated,

Plaintiff,

v.

EVAN E. JONES, JR., individually and in his capacity as the Director of the Utah State Division of Family Services; PAUL S. ROSE, individually and in his capacity as the Executive Director of the Utah State Department of Social Services; and THE PLANNED PARENTHOOD ASSOCIATION OF UTAH, a Utah non-profit corporation,

Defendants.

I. Notice is hereby given that EVAN E. JONES, JR., et al., the Defendants above named, hereby appeal to the Supreme Court of the United States from the entire Opinion and Judgment of the United States District Court for the District of Utah, Central Division, entered in this action on the 23rd day of July, 1975, and August 7, 1975, respectively.

This appeal is taken pursuant to 28 U.S.C.A., Section 1253.

II. The Clerk will please prepare a Transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said Transcript the following:

All records, files, and papers of the proceedings in the United States District Court for the District of Utah, Central Division.

The Opinion of the United States District Court for the District of Utah, Central Division, filed on July 23, 1975.

The Dissenting Opinion of the United States District Court for the District of Utah, Central Division, filed on July 23, 1975.

The Judgment of the United States District Court for the District of Utah, Central Division, filed on August 7, 1975.

III. The following specific questions are presented by this appeal:

(1) Whether or not the minor Plaintiff in this case should have a guardian ad litem appointed to represent her.

(2) Whether or not the regulations FPX 120, FPC 120 and 3.7(C) of the State Plan for providing social and Medicaid services to eligible individuals are valid and lawful exercises of state authority and are not prohibited by Section 602(a)(15) or 1396(a)(d)(4)(c) of Title 42,

U.S.C., nor the Fourteenth Amendment to the Constitution of the United States.

DATED this 28th day of August, 1975.

FRANK V. NELSON
Assistant Attorney General
Attorney for Defendant-Appellant
236 State Capitol Building
Salt Lake City, Utah 84114

APPENDIX E

PROVISIONS FROM UTAH STATE PLAN FOR PROVIDING SOCIAL AND MEDICAID SERVICES

FPX 120 Policy—Family Planning

Federal regulations authorize 90 percent Federal matching under Medicaid for offering, arranging, and furnishing directly or on a contract basis, family pjlanning services for eligible persons who desire such services. *In conformance with State Law, services to minors may be provided only with written consent of parents using the appropriate form.*

FPC 120 Policy—Family Planning Counseling

Same as Family Planning Connecting Policy FPX 120.

3.7(c) Family Planning Services

The Division provides family planning services without regard to marital status, age, or parenthood. *Family planning services will not be offered to a minor without the consent of parents.*

In the Supreme Court of the United States

October Term, 1975

No. .....

EVAN E. JONES, JR., et al.
Petitioners,

-vs-

T——— H———
Respondent

CERTIFICATE OF SERVICE

I hereby certify as Counsel for Petitioners that 3 copies of the Jurisdictional Statement have been served by mail on David S. Dolowitz, Attorney for Respondent at 79 South State Street, Salt Lake City, Utah 84111, this 23rd day of October, 1975, postage prepaid. I further certify that all parties required to be served have been served.

/s/ Robert B. Hansen

ROBERT B. HANSEN
Counsel of Record,
Attorney for Petitioner